Supreme Court, U.S.
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No. 90-1221

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

LITTON INDUSTRIAL AUTOMATION SYSTEMS, INC.
and LITTON INDUSTRIES, INC.,
Petitioners,

v.

GENERAL ELECTRIC COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below erred in finding that GE's excavation and disposal of hazardous substances at a particular site constituted a "removal" action within the meaning of the now-superseded 1985 National Contingency Plan.

2. Whether Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), which expressly authorizes recovery of the costs of "enforcement activities" as an element of the total "response costs" incurred in removing hazardous substances, permits GE to recover attorneys fees reasonably incurred in obtaining reimbursement.

RULE 29.1 STATEMENT

The respondent in these proceedings is the General Electric Company, which has no parent corporation and no subsidiaries that are not wholly owned.

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RESPONDENT'S BRIEF IN OPPOSITION

General Electric Company ("GE") hereby opposes the petition for a writ of certiorari filed in this case.

STATEMENT

1. This case involves GE's cleanup of hazardous wastes that were dumped in a field in Springfield, Missouri, during 1959-1962 by a company that was purchased and operated by petitioners. Specifically, petitioners are solely responsible for concentrations of "copper, chrome, zinc, lead and cyanide" that were placed at the site as wastes

from a typewriter factory they operated. Pet. App. A20. Although petitioners repeatedly (Pet. 3, 14) dismiss as trivial the environmental risks for which they are responsible, it is undisputed that the wastes were located a few hundred feet from residential neighborhoods to the north, apartment complexes to the west and a major street to the south. Pet. App. A13. Moreover, both the Missouri Department of Health and the courts below found that the site posed a substantial health risk to children and others in those areas. Pet. App. A3, A19, A21, A30.

In March 1970, GE purchased the site from petitioners. Petitioners did not disclose their dumping to GE and GE did not become aware of it until the summer of 1980. Initially, both GE and the state's environmental agency, the Missouri Department of Natural Resources ("MDNR"), concluded that there was no significant health risk that required cleanup work at the site. Pet. App. A2. However, in 1985, after GE arranged to sell the site to a third party, the MDNR conducted a new investigation and concluded that a significant health threat did exist. As the Environmental Protection Agency explained, "what was considered to be trace amounts in 1981 are now acknowledged as representing a threat to human health and the environment." Pet. App. A19-A20.

In response, GE employed an environmental engineering firm to study the site and to make recommendations concerning the proper response. GE then "engaged in a proper assessment of the potential hazard and evaluation of the alternative modes of remediation," and "selected the remedy that was the most cost effective in the long run." Pet. App. A40-A41.

During this period both GE and the purchaser of the property notified petitioners of the problem at the site and strongly encouraged petitioners to participate in both the planning and implementation of the site cleanup. In response, petitioners refused to "participate[] in any

of the investigation, evaluation, or cleanup of the site." Pet. App. A3-A4. Accordingly, GE entered into a consent decree with the site purchaser and the MDNR to develop and implement a cleanup plan that would be consistent with the National Contingency Plan ("NCP") of 1985, which implemented CERCLA until recently. 40 C.F.R. § 300 *et seq.* (1986). Under the decree, the planning and performance of GE's cleanup was fully monitored and approved by the MDNR.[1]

GE then proceeded to clean up the site pursuant to the decree, beginning in October 1986. Almost immediately after excavation began, GE found several drums buried just below the surface, one of which contained "extremely hazardous substances." Pet. App. A3. Cleanup was discontinued in December 1986, to permit additional site analysis after the drums were discovered, and excavation was not resumed until May 1987. The removal process was completed in December 1987. Pet. App. A3. When GE's cleanup was complete, MDNR determined that GE had complied fully with the decree and the work plan MDNR had approved, and the MDNR declared the site safe for future development and use. Pet. App. A23.

2. GE filed the instant lawsuit pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, seeking to recover from petitioners the cost of cleaning up the hazardous wastes for which petitioners were solely responsible. Petitioners' primary argument was that GE's action had constituted a "remedial action" and not a "removal" action, and that GE had not complied strictly with all of the NCP requirements for a remedial action. In particular, petitioners

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[1] The MDNR held three public meetings of the Missouri Hazardous Waste Management Commission concerning the site during the course of its assessment. The third meeting was held after the excavation option had been tentatively selected but before it had been formally approved and before the consent decree was entered. In fact, public input caused a change in the method selected for disposing of the removed wastes. Pet. App. A24.

argued that greater public participation should have been required. Accordingly, they argued that GE was not entitled to recover its costs under Section 107.

After a four-day bench trial, the district court held that all of the costs were properly recoverable under Section 107. The court found that the cleanup did constitute a "removal" within the meaning of the statute, but also held that whether GE's action was labeled as removal or remedial was irrelevant because, under either approach, GE's actions were consistent with the 1985 NCP. The court also found that every cost incurred by GE was necessary to comply with MDNR requirements. Pet. App. A22. Finally, the district court awarded GE its attorneys fees in prosecuting the action as recoverable "enforcement" costs permitted under Section 107. Pet. App. A16-A43.

The court of appeals affirmed unanimously. Pet. App. A1-A14. The court of appeals based its decision on the district court's findings that the cleanup was a removal and that GE had complied completely with the NCP requirements for removal of wastes. Pet. App. A7, A9. In analyzing the issue this way, the court of appeals followed the course proposed by the United States as *amicus curiae*. The government expressed some concern about what type of public participation would be sufficient when a cleanup is pursued as a remedial action, but argued that the court of appeals did not have to address the issue because GE's action properly was found to have been a removal action in conformity with the 1985 NCP. App., *infra* at 17a.[2] Accordingly, the United States urged the court of appeals to affirm.

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[2] Petitioners have seriously distorted the thrust of the United States' brief before the court of appeals. But, instead of engaging in a lengthy rebuttal, which would merely beg the question of which party was accurately describing the brief, GE has reproduced the United States' brief in full as an appendix to this Opposition. Suffice it to say, however, that "the importance for this Court of

The court of appeals also held that GE was entitled to attorneys fees. It reasoned that "it would strain the statutory language to the breaking point to read [attorneys fees] out of the 'necessary costs' that [CERCLA] allows private parties to recover." Pet. App. A13.

DISCUSSION

1. Petitioners argue initially that the courts below erred in finding that GE's excavation constituted a "removal" within the meaning of the statute. But this argument is inherently factbound. Moreover, the holding on this issue is correct, conflicts with no decision of any other court and accordingly does not warrant further review. Even if the issue otherwise seemed worthy of review, this would be the wrong case in which to decide it. First, the specific question posed here has extremely limited prospective significance because it depends upon GE's compliance with the 1985 NCP, which has been superseded by a 1990 plan. Additionally, petitioners are hardly the proper party to press the public interest claims they assert in this Court.

a. It is difficult to imagine an issue less worthy of review by this Court than the narrow question of whether GE's excavation of a site in Springfield, Missouri constituted a "removal" within the meaning of CERCLA. Nevertheless, in trying to convert this into an issue of broader significance, petitioners argue that there are two absolute pre-conditions to a removal which were ignored by the court of appeals. First, they assert that removal is only appropriate in response to an "imminent threat" of harm. Second, they argue that there is an absolute one-

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the decision below" is not enhanced simply because the government appeared solely for the purpose of persuading that court to do precisely what it did. To the contrary, the court's willingness to adopt the government's analysis merely "highlights" (Pet. 9) the correctness of that holding.

year time limit for accomplishing a removal. Neither assertion has merit.

First, contrary to petitioners' claim, neither CERCLA nor the 1985 NCP contains any requirement of "imminent" risk. The NCP expressly authorizes a removal action whenever *any* health threat exists. 40 C.F.R. § 300.65 (b)(1) (1988) (Pet. App. A66) (removal action authorized where "a threat to public health or welfare" exists). Indeed, at the time EPA adopted the 1985 NCP, the EPA specifically rejected an effort to require an "imminent threat" as a condition of initiating a removal action. See 50 Fed. Reg. 47,930 (1985) (explaining why "imminent danger" comments were not adopted). In the 1985 NCP, the EPA abandoned the standards and procedures for "immediate" and "planned" removal actions that existed under the 1982 NCP, 40 C.F.R. §§ 300.65-.67 (1985), in favor of a single unified and more flexible "removal" action triggered by the "threat to public health" standard in the 1985 NCP.

Under the proper "threat to public health" standard, it is clear that the decision approving this removal was correct. The court of appeals, the district court, the EPA, and the Missouri administrative agencies all have carefully reviewed the evidence and have unanimously concluded that the wastes petitioners dumped on this site constituted a hazard sufficient to warrant GE's removal action.

Second, petitioners cite nothing for the unbending rule that an excavation that is forced to continue beyond a set period of time is necessarily converted into a remedial action. The NCP explicitly exempts private party removal actions, such as GE's here, from such limitations. 40 C.F.R. § 300.65(i) (1988) (Pet. App. A68-A69). Nor is there any case or regulatory support for such a rule. Instead, the cases cited by petitioners (Pet. 13-14) merely indicate that, in general, removals are of a shorter duration than remedial actions. See, *e.g.*, *Exxon Corp.* v. *Hunt*,

475 U.S. 355 (1986) (general description of regulatory scheme in case involving unrelated issue of preemption). Nothing in the decision below conflicts with those statements.

This case well illustrates, however, why an unbending rule, such as the one petitioners propose, makes no sense. The removal here would clearly have been completed in a much shorter period of time if GE had not discovered drums and additional hazardous wastes once the excavation began. For that reason, and with MDNR approval, GE halted the removal process to assess more fully the environmental risks. After that assessment, GE proceeded to complete the removal. The entire process lasted longer than a year, but the actual excavation and removal portions of the cleanup took a considerably shorter time and one that the courts below correctly found was fully consistent with a removal action. See page 3, *supra*.

Finally, petitioners' effort categorically to exclude GE's cleanup from the definition of removal is completely undermined by the regulation defining that term. The 1985 NCP removal provision expressly declares removal of contaminated drums and highly contaminated soils, which are at issue here, to be *"as a general rule, appropriate"* for a removal action. 40 C.F.R. § 300.65(c)(6) & (7) (1988) (Pet. App. A67) (emphasis supplied). In sum, there is nothing in the decision on removal in this case that transcends the Springfield, Missouri site.

b. Even if the removal issue were arguably incorrectly decided and somehow presented a legal issue, it is clear that the holding concerning compliance with the 1985 NCP has limited prospective significance. In response to the 1986 SARA amendments,[3] the EPA has promulgated a new 1990 NCP that substantially alters the provisions of

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[3] Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) ("SARA") (codified as amended at 42 U.S.C. § 9601 *et seq.*).

the 1985 NCP in the very areas on which petitioners now focus—removal and remedial actions.[4] Because the NCP in effect at the time response costs are incurred will govern the recoverability of those costs, *Wickland Oil Terminals* v. *Asarco, Inc.*, 792 F.2d 887, 891 (9th Cir. 1986), any interpretation by this Court of the now superseded NCP would be of limited applicability for future cases.

c. Finally, petitioners' arguments extolling the virtues of public participation in the cleanup of hazardous wastes are disingenuous. Petitioners basically argue that GE made the site too clean, and that greater public involvement was important to increase the likelihood that a less effective method of cleanup might have been adopted. It is nonsense for petitioners to suggest that the public might have urged a *less* protective or effective remedy than that approved by the state agencies responsible for protecting the public health and welfare.[5]

Nor was greater opportunity for public participation necessary to ensure that petitioners themselves were informed about GE's cleanup efforts. As the district court

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[4] As a result of the EPA's revisions to the NCP, the 1990 NCP imposes new substantive requirements for both removals and remedial actions, in the types of assessments preceding each, in the standards applied to each, and in the public participation associated with each. Compare, *e.g.*, 40 C.F.R. §§ 300.64 and 300.65 (1988) (Pet. App. A65) with 40 C.F.R. §§ 300.410 and 300.415 (1990) (Pet. App. A88-A96).

[5] Petitioners' repeated assertions that GE somehow acted improperly in its sale of the site to a third party and that GE engaged in gold plating in its removal actions are completely contradicted by the findings of the lower courts. With respect to the sale, the district court pointedly found that petitioners have "not been injured nor prejudiced by any actions of GE regarding the subsequent sale of the property." Pet. App. A27. Moreover, all of the costs were found to have been necessary to effect compliance with the 1985 NCP as enforced by the state agency. Pet. App. A11, A40-A41. Petitioners simply have no factually supported basis for complaining about the ultimate costs of a removal in which they refused to participate.

pointedly observed, petitioners already "had every opportunity to participate in the clean-up but failed to do so." Pet. App. A41. Under these circumstances, petitioners' claim that interests in public participation were somehow impaired by the removal in this case is completely hollow.

2. Petitioners argue that the courts below erred in holding that attorneys fees are recoverable under Section 107 by a party such as GE—which has incurred all of the costs of removal of hazardous wastes and which seeks nothing more than reimbursement—from the party who is responsible for the wastes and who has refused to participate in any way in the cleanup. The holding of the Eighth Circuit, however, is based squarely on the text of the statute and unquestionably promotes the essential purposes of CERCLA. Moreover, petitioners acknowledge that the decision of the court of appeals is the first appellate decision on this question. Thus, even if the holding were less clearly correct, the issue still would not warrant review now.

There is a clear textual authorization for the fee recovery in the statute. Under Section 107 of CERCLA, liable parties such as petitioners are liable for any necessary "costs of response." 42 U.S.C. § 9607(a)(4)(B). Under Section 101 of CERCLA, the term "response" means "remove, removal, remedy, and remedial action, *all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto.*" 42 U.S.C. § 9601(25) (1988) (emphasis added). As both courts below concluded, "enforcement activities" was a reference to activities to enforce CERCLA's cost recovery provisions, including attorneys fees and expenses.[6] As another court has held,

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[6] The "enforcement activities" language was added to CERCLA by the SARA amendments. Prior to 1986, the term "response" was defined as meaning "remove, removal, remedy, and remedial action." 42 U.S.C. 9601(25) (1982). The 1986 SARA amendments added on the end of that definition that "[a]ll such terms (including the

> Congress intended for "enforcement activities" to include attorneys fees expended to induce a responsible party to comply with the remedial actions mandated by CERCLA. This court cannot ascertain any other logical interpretation which would give effect to this phrase. If this court were to rule otherwise, the phrase "enforcement activities" would be superfluous.

Pease & Curren Ref., Inc. v. *Spectrolab, Inc.*, 744 F. Supp. 945, 949-52 (C.D. Cal. 1990). *Accord Shapiro* v. *Alexanderson*, 741 F. Supp. 472, 480, *reh'g denied*, 743 F. Supp. 268 (S.D.N.Y. 1990).

Even petitioners seem to concede that Congress inserted the term "enforcement activities" to make certain that the recovery of attorneys fees, which had been upheld in a few government cost recovery cases, would continue. Pet. 17. However, citing irrelevant legislative history,[7] petitioners incorrectly argue that Congress only intended for the government to recover attorneys fees, and not for private parties to do so.

This argument is refuted by the statute itself. The SARA amendments placed the "enforcement" language in a general definitional section which applies to *all* parties—both governmental and private—acting under Section 107 of CERCLA. Had Congress intended to limit the recovery of attorneys fees to the government, Congress

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terms 'removal' and 'remedial action') *include enforcement activities related thereto.*" 42 U.S.C. § 9601(25) (1988) (emphasis added).

[7] Petitioners argue that Congress intended the "enforcement" language to cover attorneys fees, but *only the EPA's attorneys fees.* Petitioners' sole support for this argument is a House Report, H.R. Rep. No. 253, which stated that the SARA amendment related to EPA's cost recovery. Pet. 17. However, this Report was attached to a bill that did *not* become law, H.R. 2817, see 1986 U.S. Code Cong. & Admin. News 2835, and the conference report to the bill which did become law has no such EPA-restricted language. H.R. Conf. Rep. 962, 99th Cong., 2d Sess. 4, *reprinted in* 1986 U.S. Code Cong. & Admin. News 3276.

would not have placed the amendment in a provision of general applicability. Congress could have placed the amendment in a CERCLA section applicable only to the government,[8] or it could have expressly qualified the right. There is, however, nothing inherent in the phrase "enforcement activities" to suggest it should be limited to governmental, as opposed to private, enforcement activities: courts have repeatedly characterized private party CERCLA cost-recovery actions as "private enforcement." *Wickland Oil Terminals*, 792 F.2d at 892 ("private enforcement actions under section 107(a)"); *Cadillac Fairview/California, Inc.* v. *Dow Chem. Co.*, 840 F.2d 691, 694 (9th Cir. 1988) ("private enforcement actions").

GE invoked Section 107 in precisely the same way the United States does when it seeks to collect CERCLA response costs. Given that private parties have the right to bring cost-recovery actions under CERCLA, that both the government and private parties look to the same provision for recovery of response costs, and that the definition of "response" is the same for *all parties* pursuing an action under Section 107, petitioners cannot reasonably contend that there is no authority for recovery of attorneys fees. Accordingly, because the attorneys fee award in this case is fully supported by the statutory language and by the articulated Congressional purposes of encouraging voluntary cleanups and settlements, the petition should be denied.

Finally, even if the statutory authorization for fee recovery was not as clear as it is, there are relatively few

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[8] Section 104, cited by petitioners, authorizes the Government to perform environmental responses, to incur expenses in connection therewith, and to pursue cost recovery actions for reimbursement. When the Government files such actions, however, it does so under Section 107, the section which defines cost recovery actions and creates the liability for "any other necessary costs of response." The relief obtainable flows from Section 107, as defined in Section 101(25), and is the same relief available to private parties when they act under this provision.

cases interpreting this statute and no case other than this one has reached a court of appeals. Until such time as an appellate court rejects the persuasive reasoning of the Eighth Circuit, it is clearly premature for this Court to consider the issue.

* * * *

At the end of the day, this is a case that should never have required litigation. Petitioners were responsible for all of the hazardous wastes; they had complete knowledge of both their responsibility and GE's proposed course of action. GE performed the response action effectively and included no unnecessary costs. Petitioners simply ignored the problem. What they should have done was to reach some agreement with GE (either before or after removal) with respect to these costs. Instead, petitioners have fought, now all the way to this Court, to avoid their responsibility. The fight should end now; the petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2845 WM

GENERAL ELECTRIC COMPANY,
Plaintiff-Appellee,

v.

LITTON BUSINESS SYSTEMS, INC.,
Defendant-Appellant

On Appeal From the United States District Court
for the Western District of Missouri

BRIEF FOR THE UNITED STATES, *AMICUS CURIAE*

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

In this case, General Electric Company (GE) filed a private cost recovery action against Litton Business Systems under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9607(a). GE sought recovery of nearly $1 million in costs incurred in removing hazardous substances from a site GE bought from Litton in 1970. After a trial, the district court (Clark, J.) found Litton liable for all response costs incurred by GE. 715 F. Supp. 949. The court rejected Litton's contention that GE had not complied with the public comment requirement of the National Contingency Plan, and determined that GE's "compliance with legally applicable or relevant appropriate state requirements provides a substantially equivalent opportunity for public involvement" (*id.* at 961), stating that "if notice to the public is a requirement, the input of the Missouri Department of Natural Resources serves as a substitute for public comment." *Id.* Based on GE's documented cooperation with the State, the court concluded that GE's actions were "consistent with the NCP." *Id.* at 961; see *id.* at 963. The court also rejected Litton's "unclean hands" defense, ruling that the equitable principle did not apply in this case because GE's alleged misconduct neither injured nor prejudiced Litton (*id.* at 955); it questioned whether that principle could ever apply in an action under CERCLA. *Ibid.*

Litton now appeals from that judgment. Since the United States is appearing solely as *amicus curiae*, we express no view with regard to oral argument.

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Section 113(a), 42 U.S.C. 9613(a) [12a]
Section 113(f)(1), 42 U.S.C. 9613(f)(1) [11a]
Section 221, 42 U.S.C. 9631 [11a]
40 C.F.R. 300.1 *et seq.* [7a, 12a]
40 C.F.R. 300.65 [*passim*]
40 C.F.R. 300.65(b)(3) [13a]
40 C.F.R. 300.67 [13a]
40 C.F.R. 300.67(b) [13a]
40 C.F.R. 300.67(d) [7a]
40 C.F.R. 300.68 [14a, 17a, 18a]
40 C.F.R. 300.68(j)(3) [18a]
40 C.F.R. 300.71 [7a]
40 C.F.R. 300.71(a)(2)(i) [13a]
40 C.F.R. 300.71(a)(2)(ii)(D) [14a, 19a]
40 C.F.R. 300.1-300.81 [12a]

Miscellaneous:

"Developments in the Law Toxic Waste Litigation," 99 Harv. L. Rev. 1458 (1986) [9a]

No. 89-2845 WM

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

GENERAL ELECTRIC COMPANY,
Plaintiff-Appellee

v.

LITTON BUSINESS SYSTEMS, INC.,
Defendant-Appellant

On Appeal From the United States District Court
for the Western District of Missouri

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

OPINION BELOW

The opinion of District Judge Russell G. Clark appears at Joint Appendix 5 and is reported at 715 F. Supp. 949.

STATEMENT OF JURISDICTION

The judgment was entered on June 20, 1989, and a timely notice of appeal was filed by Litton Business Systems, Inc. on November 13, 1989, pursuant to 28 U.S.C. 2107 and Fed. R. Civ. P. 4(a)(1). The jurisdiction of this Court rests on 28 U.S.C. 1291.

ISSUE PRESENTED

Whether compliance with state regulatory provisions concerning removing hazardous substances from a particular site satisfies the prerequisites for recovering response costs for actions under Section 107(a)(4)(B) of

the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as specified in the "National Contingency Plan" (NCP) adopted by the Environmental Protection Agency, 40 C.F.R. 300.1 *et seq.*, including any applicable public participation requirements.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Due to their length, Sections 107(a), 101(23) and (24) of CERCLA, 94 Stat. 2796, as amended, 42 U.S.C. 9607(a), 9601(23) and (24), and 40 C.F.R. 300.65, 300.71 and 300.67(d), are reproduced as an Addendum to this brief.

INTEREST OF THE UNITED STATES AND SUMMARY OF ARGUMENT

The United States agrees that the district court reached the correct result on the public participation issue in this case. Based upon the evidence available to it, the United States believes that the record in this case indicates that the General Electric Co. (GE) action may have been a "removal" action (CERCLA Section 101(23)) to which no public participation requirements attach, and that even if the action were considered to be a "remedial" action (CERCLA Section 101(24)), the record supports a conclusion that GE substantially complied with the NCP's requirement for "public comment." We also believe that the court properly rejected defendant Litton's unclean hands argument. The chief reason of the United States for participating in this appeal is to assist this Court in developing a sound rationale for this result.

We are uneasy about the district court's articulation of the standards for a private party's compliance with the pertinent NCP public participation requirements for *remedial* actions. The district court concluded, first, that no public hearing was required because GE complied with the legally applicable or relevant and appropriate state

requirements (ARARs) that the substances be removed. 715 F. Supp. at 961. Second, the court proffers an alternative ground for NCP compliance by stating that the state's "input" on GE's response action served as a substitute for public comment. *Ibid.* To the extent that the district court's opinion may be read as suggesting that compliance with substantive state regulatory waste-removal provisions alone satisfies the public participation requirements for remedial actions, this conclusion is wrong because it belittles the importance of the public participation contemplated by the NCP. Accordingly, the United States wishes to emphasize that compliance with a state regulatory provision may satisfy the federal NCP requirement for public participation during selection of a remedial action, but only if that provision in fact offers "substantially equivalent" opportunities for public comment.

It is established policy under CERCLA to encourage private parties to perform voluntary cleanups. See *Exxon v. Hunt*, 475 U.S. 355, 359 (1986). Cleanups which are undertaken and financed by private parties serve to enhance the enforcement efforts of EPA and to preserve the resources of the Superfund for use at sites without identified or financially viable responsible parties. Accordingly, it is important that technical obstacles not prevent these parties from recovering their response costs from those who are responsible for the contamination. The application of a rigid, formalistic test to a party's compliance with the public comment requirement for remedial actions would, in the view of the United States, serve as a disincentive to voluntary cleanups.[1] Nevertheless, this policy must be balanced against the interest that the public has in participating in the selection of a response

[1] Additionally, The United States could be prejudiced if technical inconsistencies with the NCP precluded recovery by the Environmental Protection Agency (EPA) in its enforcement actions. 42 U.S.C. 9607(a)(4)(A).

action, and the interest of the public in assuring that an environmentally sound cleanup occurs.

The United States believes that this Court, in resolving this matter, should not apply an overly restrictive test for compliance with the public comment requirement for remedial actions. One of Congress' principal purposes in enacting CERCLA was to place the costs and responsibility for remedying harmful conditions caused by hazardous waste disposal on those responsible for the problem. See, *e.g.*, *Dedham Water Co. v. Cumberland Farms Dairy*, 805 F.2d 1074, 1081 (1st Cir. 1986). Similarly, the United States does not want to discourage private parties from cleaning up hazardous waste sites by encouraging excessive formalism; the Environmental Protection Agency believes that private party cost recovery should be allowed where it proceeds in "substantial" compliance with EPA's regulations, including the requirement that concerned parties be allowed to review and evaluate proposed remedial actions. The 1985 NCP was designed to encourage more private sector cleanups —cleanups that had been discouraged by courts' restrictive readings of Section 107(a)(4)(B)'s requirement of consistency with the NCP. See Note, "Developments in the Law—Toxic Waste Litigation," 99 Harv. L.Rev. 1458, 1503 (1986) (by including the public comment requirement concerning the selection of a remedial action, the NCP "prevents the streamlined response that should be the primary advantage of private party cleanups."). For these reasons, the United States has determined to participate as *amicus* in this case to assist this Court in defining the rules for private party compliance with the NCP public participation requirements.

In this brief, we will first clarify what distinguishes a "removal" from a "remedial" action, and explain what public participation standards are applicable to both types of actions under the NCP. We will point out, first, that there would be no applicable public partici-

pation requirements if this clean up were viewed as a removal rather than a remedial action (see *supra* at 9). Second, if the cleanup is considered a remedial action, there must be opportunities for public participation substantially equivalent to those called for in the NCP (*supra* at 16). Finally, we will explain why "unclean hands" is not an available defense to liability in CERCLA cost recovery actions.

STATEMENT

1. *Statutory and regulatory framework.*—Congress enacted CERCLA, 94 Stat. 2796, 42 U.S.C. 9601 *et seq.*, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), 100 Stat. 1613, as a legislative response to the growing problem of toxic wastes, many of which were disposed of before their dangers were widely known and had contaminated land and water resources. The statute attempts to create a coherent answer to two related problems: the emergency abatement of releases of hazardous substances into the environment and the response, both short- and long-term, to the presence of hazardous substances in existing disposal sites. See *Lone Pine Steering Committee v. EPA*, 777 F.2d 882, 886 (3d Cir. 1985), cert. denied, 476 U.S. 1115 (1986). Many of these sites had been abandoned by any party who could be held accountable for the cleanup. Whenever possible, however, CERCLA places the ultimate financial burden of toxic waste cleanup on those responsible for creating the harmful conditions. See *Exxon Corp. v. Hunt*, 475 U.S. 355, 359 (1986); *U.S. v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989).

Section 105 of CERCLA authorizes the President to incorporate into the national contingency plan (NCP) "procedures and standards for responding to releases of hazardous substances." 42 U.S.C. 9605. Section 221 established the Hazardous Substance Response Trust Fund,

popularly known as the "Superfund." 42 U.S.C. 9631.[2] Superfund monies finance response measures by the Environmental Protection Agency that are consistent with the national contingency plan. CERCLA Sections 104 and 111(a)(1), 42 U.S.C. 9604 and 9611(a)(1). They also finance private response costs that are approved under the NCP and are federally certified. Section 111 (a)(2), 42 U.S.C. 9611(a)(2). In addition, under Section 106 the federal government may seek injunctive relief from the actual or threatened release of a hazardous substance. 42 U.S.C. 9606. Section 107(a)(4)(A) makes certain parties responsible for the presence of hazardous substances liable to federal and state governments and Indian tribes for response costs. 42 U.S.C. 9607(a)(4)(A). For example, current owners and operators of the property are liable under Section 107(a)(1), while former owners and operators such as Litton are liable under Section 107(a)(2). Other categories of liable persons include "transporters" and "generators" of hazardous substances. 42 U.S.C. 9607(a)(3)-(4). *U.S. v. Aceto Agricultural Chemicals Corp.*, 872 F.2d at 1377. Similarly, Section 107(a)(4)(B), makes responsible parties liable to private persons for response costs. 42 U.S.C. 9607(a)(4)(B). In those situations in which the party seeking recovery is also statutorily liable the claim may be one for contribution which is authorized under Section 113(f)(1). 42 U.S.C. 9613(f)(1). See *Smith Land and Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 88-89 (3rd Cir. 1988), cert. denied, 109 S. Ct. 837 (1989).

CERCLA Section 107(a)(4)(B), the focal point of this case, expressly creates a private cause of action against Section 107(a)-responsible parties for the recovery of "necessary costs of response incurred by any other person consistent with the national contingency

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[2] Repealed by SARA; the Hazardous Substance Superfund is currently established under 26 U.S.C. 9507.

plan [NCP]." 42 U.S.C. 9607(a)(4)(B).[3] (The NCP is the set of regulations promulgated by the EPA that govern response actions for hazardous substance releases and provide appropriate guidelines for state and federal agencies. See 40 C.F.R. 300.1 *et seq.*) [4]

The statute was designed primarily to facilitate the prompt cleanup of hazardous substances sites. It accomplishes this purpose by placing the ultimate financial responsibility for cleanup on those responsible for the hazardous wastes. *Exxon v. Hunt*, *supra*; *Walls v. Waste Resources Corp.*, 761 F.2d 311, 318 (6th Cir. 1985). Allowing a private action to recover response costs from

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[3] An action for natural resource damages may be brought only by the United States, a state government, or an Indian tribe. *Id.* Section 107(f), 42 U.S.C. 9607(f). Response actions taken by the United States, a state government, or an Indian tribe are presumed to be "not inconsistent with the national contingency plan" under Section 107(a)(4)(A); the defendant has the burden of proving otherwise. *United States v. Northeastern Pharmaceutical & Chem. Co., Inc.*, 810 F.2d 726, 747 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987). Conversely, private plaintiffs have the burden of proving that their response actions are "consistent with the national contingency plan" under Sectior 107(a)(4)(B). *Artesian Water Co. v. Gov. of New Castle County*, 659 F. Supp. 1269, 1277 n.8 (D. Del. 1987) (citations omitted); aff'd on other grounds, 851 F.2d 643 (3d Cir. 1988); *New York v. Shore Realty Corp.*, 648 F. Supp. 255, 268 (E.D. N.Y. 1986); *Bulk Distrib. Centers, Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1444 (S.D. Fla. 1984).

[4] The NCP constitutes EPA's national regulations adopted under Section 105 of CERCLA appearing at 40 C.F.R. 300.1-300.81. The regulations describe methods of responding to hazardous substance releases and set forth guidelines for the appropriate roles of state and federal agencies and private parties. Judicial review of these regulations can be had only by filing a petition for review in the District of Columbia Circuit under Section 113(a) of CERCLA, 42 U.S.C. 9613(a). The NCP cannot be challenged in district court in the context of a cost recovery action. On February 2, 1990, the EPA Administrator signed a final rule revising the NCP; that rule will take effect 20 days after publication in the Federal Register. Publication is expected by the end of February.

responsible parties under Section 107(a)(4)(B) is thus consistent with both the language of that Section and the congressional purpose underlying CERCLA as a whole.

CERCLA delineates two types of response actions—"removal" and "remedial" actions, see Section 101(23) and (24), each of which must comply with certain requirements under the NCP. Removal actions are generally short-term environmental responses. Remedial actions, on the other hand, are generally long-term responses. *Amland Properties Corp. v. Aluminum Co. of America*, 711 F. Supp. 784, 795 (D. N.J. 1989).[5] For removal actions, the NCP provides for relatively simple procedural prerequisites. See 40 C.F.R. 300.65. Section 300.65 of the NCP sets forth no requirements for opportunities for public comment for private party removal actions (except to the extent such opportunities are required by legally applicable or relevant and appropriate state requirements (ARARs) and are practicable).[6]

With respect to remedial actions, however, the NCP provides for substantially more detailed procedural and

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[5] For example, the 1985 version of the NCP that applies here, with a number of exceptions, sets a $1 million limit or a six-month deadline for a *Superfund-financed* "removal action." 40 C.F.R. 300.65(b)(3). On October 17, 1986, the Superfund Amendment and Reauthorization Act extended the limits to 1 year and $2 million for a CERCLA removal action. 42 U.S.C. 9604(c)(1). The statute also allows exceptions to these limits.

[6] The NCP does require that removal actions taken "pursuant to section 300.65" include a formal community relations plan for actions extending beyond 45 days and have a spokesperson to inform the community of actions taken and respond to inquiries. 40 C.F.R. 300.67. While this requirement appears to apply to state, federal lead or tribal removals, private party actions are not taken "pursuant to section 300.65" and thus are not specifically required to meet these same requirements; rather, 40 C.F.R. 300.71(a)(2)(i) simply requires private party actions to be "consistent with" Section 300.65. (To the extent the requirement in 40 C.F.R. 300.67(b) is found to apply, the public meetings at which the site was discussed appear to satisfy the requirement.)

substantive requirements. See 40 C.F.R. 300.68. In particular, the NCP requires, among other things, that a private party contemplating the undertaking of a remedial action must first provide an opportunity for "appropriate public comment" unless compliance with a state regulatory provision "provides a substantially equivalent opportunity for public involvement on the choice of remedy." 40 C.F.R. 300.71(a)(2)(ii)(D).

The distinction between public participation regulations for removal as opposed to remedial actions is important because removal actions need comply only with the relatively simple NCP requirements set forth at 40 C.F.R. 300.65, whereas remedial actions must comport with "more detailed procedural and substantive provisions of the NCP" set forth at 40 C.P.R. 300.68. *Amland, supra* (citations omitted); *Versatile Metals, Inc. v. Union Corp.*, 693 F. Supp. 1563, 1577-1578 (E.D. Pa. 1988).

2. *The facts of this controversy.*—In this case, GE brought a private party recovery action pursuant to Section 107(a)(4)(B) of CERCLA against Litton Business Systems, Inc. (Litton). GE sought recovery of costs incurred in cleaning up cyanide-based electroplating solutions and residues at a Springfield, Mo., site which it purchased from Litton in 1970. Litton is the successor by merger to Royal McBee Corporation, which, through its subsidiary, Royal Typewriter, operated a manufacturing facility at the site between 1959 and 1965. Litton continued the business until 1969 when operations were shut down. A byproduct of the manufacturing process was cyanide-based electroplating waste which was dumped on a vacant portion of the site, which adjoins apartment complexes and retail, commercial, and manufacturing properties.

After a four-day bench trial, the district court found Litton liable for all response costs incurred by GE. 715 F. Supp. 949. The court also awarded GE prejudgment

interest and attorneys' fees. In so doing, the court rejected Litton's argument that GE's public participation activities were not consistent with the NCP and, thus, that its costs were not recoverable in accordance with Section 107(a)(4)(B) of CERCLA.

In its opinion, the district court found that there was no evidence that GE had dumped any waste containing the chemicals later found to be the source of contamination. 715 F. Supp. at 951. The court found that GE had worked with the State to develop a remediation plan, entered into an administrative consent decree under State law, and conducted and financed the cleanup. *Id.* at 951-954. Although GE gave Litton early notice of its CERCLA claim, Litton chose not to participate in the remediation effort. *Id.* at 952.

The court addressed in summary fashion each element of CERCLA liability and found Litton liable. In particular, based on GE's close cooperation with state authorities, the court found that GE's public participation activities were "consistent with the NCP." *Id.* at 961 and 963. For example, in rejecting Litton's challenge to GE's recovery on the ground that GE failed to comply with the public hearing requirement of the NCP, the court found that GE implemented a removal action consistent with the NCP and Section 300.65 (*id.* at 960 and 961), and that GE's "compliance with legally applicable or relevant and appropriate state requirements provides a substantially equivalent opportunity for public involvement," *id.* at 961. Furthermore, the court stated that "if notice to the public is a requirement, the input of the Missouri Department of Natural Resources serves as a substitute for public comment." *Ibid.*

The court rejected Litton's defense that GE should be barred from recovering because of unclean hands. *Id.* at 955. Litton had argued that GE should be barred from recovering because several years after discovery of the

contamination, but before the cleanup, GE agreed to sell the site to a third party, allegedly without disclosing Litton's dumping. The court held that the principle of unclean hands was inapplicable to the facts because Litton was not injured or prejudiced by GE's alleged improper conduct. *Ibid.* In *dicta*, the court also stated that it is "doubtful" whether the doctrine is applicable in CERCLA cases. *Ibid.*

Finally, the court disposed of Litton's argument that the "Collateral Benefit Rule" should bar GE from benefiting by having Litton pay for the cleanup because, allegedly, GE knew about the dumping when it purchased the site in 1970. *Id.* at 963. The court ruled that the evidence failed to support Litton's argument that the property was being used as a dump when GE bought it, or that GE could have seen such dumping activities since they were not visible from the plant.

This appeal followed.

STANDARD OF APPELLATE REVIEW

The questions (1) whether GE, removing hazardous waste from a particular site, satisfied the prerequisites for a private recovery of response costs under CERCLA, as specified in the "National Contingency Plan" adopted by the Environmental Protection Agency, including any applicable public participation requirements, and (2) whether the defense of unclean hands bars private recovery actions under CERCLA, are both issues of law reviewable *de novo* in this Court. *Wells v. Walker*, 852 F.2d 368 (8th Cir. 1988), cert. denied, 109 S. Ct. 1121 (1989).

ARGUMENT

I

THE 1985 NATIONAL CONTINGENCY PLAN DOES NOT SPECIFICALLY REQUIRE THAT PRIVATE PARTIES PROVIDE FOR OPPORTUNITIES FOR PUBLIC COMMENT IN FORMULATING AND IN CONDUCTING A "REMOVAL" ACTION

As an initial matter, it is important to decide whether GE conducted a "removal" or "remedial" action. The distinction is important because, as we have explained (*supra* at 9), GE's compliance with the NCP's public participation requirement is relevant only if GE's response action was, in fact, a remedial action.

The district court explicitly found that "GE's action was consistent with the NCP as a removal action" (715 F. Supp. at 960) and stated further that "plaintiff implemented the removal action consistent with § 300.65 [which governs removal actions]" (*id.* at 961), strongly suggesting that the district found the action to be a removal. Further, the action was "short-term," as it was completed in less than 2 months (*id.* at 953) and at a cost (with interest) of approximately $1 million (*id.* at 963). Indeed, the court concluded that "no public hearing was required due to the fact that GE was complying with legally applicable or relevant and appropriate state requirements *that the waste be removed.*" *Id.* at 961 (emphasis supplied). However, at the same time, the court found that GE provided a "site investigation and analysis of remedial alternatives as required under 300.68 [which governs remedial actions]," *Id.* and the court also discussed at length the requirements of 300.68. *Id.* at 961-62. This raises some question as to whether the

district court firmly decided if GE's action was a removal or a remedial action under CERCLA.[7]

Overall, the court's findings of fact suggest that the record would support the conclusion that GE conducted only a "removal" action. ("Court finds that GE's action was consistent with the NCP as a removal action" 715 F. Supp. at 960, and "[i]t is clear to this Court that plaintiff [GE] implemented the removal action consistent with § 300.65" *id.* 961.) As set forth above, if GE's response at the site was a "removal" action, the 1985 NCP sets forth no specific requirements for public comment opportunities (except to the extent such opportunities are required by ARARs and are practicable). 40 C.F.R. 300.65.[8] Thus, if GE's action was a "removal" under the 1985 NCP, then the court's discussion of GE's compliance with the NCP's public participation requirement may be presumed to be *dicta*, in response to Litton's claims, and is not necessary to the court's holding. (Note that Litton's brief clearly treats GE's action as remedial, subject to the full panoply of procedures mandated by § 300.68.)

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[7] We note that a Remedial Investigation/Feasibility Study (RI/RS) was performed at the GE site. Such studies generally precede remedial actions, although in many cases a removal may be performed based on finding in an RI/FS. Also, soil removal can be an appropriate action to be taken in the context of a remedial action. 40 C.F.R. 300.68(j)(3).

[8] See footnote 6.

II

COMPLIANCE WITH STATE REGULATORY PROVISIONS PERTAINING TO THE CLEANUP OF A HAZARDOUS WASTE SITE SATISFIES THE "PUBLIC PARTICIPATION" REQUIREMENTS OF THE 1985 NCP FOR A "REMEDIAL" ACTION ONLY IF THE STATE REGULATORY PROVISIONS PROVIDE FOR A SUBSTANTIALLY EQUIVALENT OPPORTUNITY FOR PUBLIC INVOLVEMENT IN THE CHOICE OF THE "REMEDY"

Assuming, however, that GE's response constituted a "remedial" action, the United States regards as troubling the court's conclusion that no public comment was required because GE was complying with legally applicable or relevant and appropriate state requirements (ARARs) "that the waste be removed." *Id.* at 961.

If GE's action were a remedial action no public hearing would have been required if GE had been complying with ARARs that "provide[d] a substantially equivalent opportunity for public involvement in the choice of remedy." 300.71(a)(2)(ii)(D). Compliance with a substantive ARAR governing the extent and results of remedy action, however, does not necessarily satisfy the public participation requirement of the NCP. The district court's statement could be read to suggest that such substantive compliance would be sufficient, since it refers to the ARAR standard for remedial actions.[9] The district court may have concluded, *sub silentio*, that compliance with one or more ARARs provided "substantially equivalent" opportunities for public involvement, but the opin-

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[9] The court's statement may also be read to reflect a finding that no public hearing was required because the state requirement "that the wastes be removed" identifies GE's response as a "removal" action.

ion lacks such an analysis.[10] The United States submits that compliance with a state ARAR satisfies the public participation requirements of the 1985 NCP for a remedial action only if that ARAR includes procedural provisions that afford "substantially equivalent" opportunities for public involvement. The district court's opinion here does not show how compliance with a specific state ARAR with procedural elements afforded "substantially equivalent" opportunities for public participation and thus satisfied the requirements for remedial actions in the 1985 NCP.

The district court's additional statement that the State's input in the remedy selection "serves as a substitute for public comment," is, in the view of the United States, erroneous. The United States submits that a private party taking remedial action must either provide some opportunity for public comment on the alternatives from which a remedial action will be selected, or comply with a state or local ARAR that includes substantially equivalent opportunities for public participation in the selection of the remedy. The involvement of the state is simply not a substitute for public participation rights.[11]

Of course, even assuming that GE's response was indeed a remedial action, the record in this case may well support the conclusion that there was substantial compliance with the public participation requirement. For example, the opinion indicates that the State Hazardous Waste Commission held three meetings in which the GE

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[10] There are findings of fact showing public participation (see, *e.g.*, finding 20, *id.* at 952), but these findings are not referenced in the public participation discussion.

[11] Recently, for instance, in *Amland Properties Corp. v. Aluminum Co. of America*, 711 F. Supp. 784 (D. N.J. 1989), the court rejected the contention that the participation of state and local officials, and the participation of the state environmental agency in the standard-setting process obviated the need for a public comment period. *Id.* at 801.

site was discussed. *Id.* at 952. The district court found that these public hearings were held "both before and during the course of the cleanup at the site[,]" that public notice was provided, and that the public attended the meetings. *Id.*[12] Litton cannot convincingly assert that the public was not involved in the cleanup process in the face of the court's finding that changes in the response actions were made because of "local publicity." *Id.* at 954. If the public had an opportunity to discuss the remediation plans at these hearings, then GE's response actions may well have been consistent with the public participation requirements of the 1985 NCP, even those for remedial actions.[13] If this was indeed the case, then the federal government's concerns about sustaining the integrity of the public participation process would be satisfied.

III

UNCLEAN HANDS IS NOT AVAILABLE AS A DEFENSE IN CERCLA PRIVATE PARTY ACTIONS

While Litton does not directly raise the defense of "unclean hands" in its opening brief, it did so below, and here it attacks GE's motives and tactics in this controversy. It is thus worth pointing out that "unclean hands" is not an available defense to *liability* in a CERCLA cost recovery action under Section 107(a), al-

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[12] In addition to the fact that public meetings were held to discuss the GE site, the district court specifically found that Litton was directly advised of GE's potential CERCLA claims *prior* to the time that they were incurred, but chose not to cooperate with GE in negotiating with regard to the cleanup (an issue which Litton's brief on appeal does not address). *Id.* at 952 and 954. Thus, Litton clearly had an opportunity to participate in the response action, and no other member of the public has asserted a denial of a similar opportunity for involvement. Litton's notice of GE's actions, while not determinative of GE's compliance of the NCP's public participation requirements, is arguably a factor to be considered in allocating the parties' equitable shares of response costs.

[13] We have been advised that no transcripts were made of these state commission meetings.

though the courts may equitably allocate response costs as they determine to be appropriate when both plaintiff and defendant are liable entities and the suit is thus for contribution. *Smith Land & Improvement Corp.*, 851 F.2d at 88-89. The district court properly rejected Litton's unclean hands argument: CERCLA is a strict liability statute, *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir 1985); *U.S. v. Aceto Agricultural Chemical Corp.*, 872 F.2d at 1377. The statute, in Section 107(b) allows only a limited set of defenses against liability, 42 U.S.C. 9607(b). Equitable defenses, such as "unclean hands," are not among the defenses Congress authorized in Section 107(b). However, it may be apropriate for a court to consider equitable defenses similar to unclean hands in apportioning costs under CERCLA Section 113(f). See *Smith Land & Improvement Corp., supra.*

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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